

CIVIL COVER SHEET

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON PAGE TWO.)

I.(a) PLAINTIFFS

Nathaniel Bowden; JuNelle Harris

DEFENDANTS

Robin L. Barrett; Emilio T. Gonzalez; USCIS; Michael Chertoff; DHS; Robert S. Mueller; Peter D. Keisler

(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF
(EXCEPT IN U.S. PLAINTIFF CASES)

Alameda

COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)

Robert B. Jobe, Law Office of Robert B. Jobe, 550 Kearny St., Ste. 200, San Francisco, CA 94108

ATTORNEYS (IF KNOWN)

US Attorney's Office, 450 Golden Gate Ave., 11th Fl., San Francisco, CA 94102

II. BASIS OF JURISDICTION (PLACE AN 'X' IN ONE BOX ONLY)

- ☐ 1 U.S. Government Plaintiff
- ☒ 2 U.S. Government Defendant
- ☐ 3 Federal Question (U.S. Government Not a Party)
- ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (PLACE AN 'X' IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT)

- | | PTF | DEF | | PTF | DEF |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
| Citizen of This State | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. ORIGIN

(PLACE AN "X" IN ONE BOX ONLY)

- ☒ Original Proceeding
- ☐ Removed from State Court
- ☐ Remanded from Appellate Court
- ☐ Reinstated or Reopened
- ☐ Transferred from Another district (specify)
- ☐ Multidistrict Litigation
- ☐ Appeal to District Judge from Magistrate Judgment

V. NATURE OF SUIT (PLACE AN "X" IN ONE BOX ONLY)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault Libel & Slander <input type="checkbox"/> 330 Federal Employers Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury PERSONAL INJURY <input type="checkbox"/> 362 Personal Injury Med Malpractice <input type="checkbox"/> 365 Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth In Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 RR & Truck <input type="checkbox"/> 650 Airline Regs <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt Relations <input type="checkbox"/> 730 Labor/Mgmt Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl.Ret. Inc. Security Act	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (US Plaintiff or Defendant) <input type="checkbox"/> 871 IRS - Third Party 26 USC 7609	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce/ICC Rates/etc. <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes <input checked="" type="checkbox"/> 890 Other Statutory Actions
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 445 Amer w/ disab - Empl <input type="checkbox"/> 446 Amer w/ disab - Other <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Satellite TV	PRISONER PETITIONS <input type="checkbox"/> 510 Motion to Vacate Sentence Habeas Corpus: <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition		

VI. CAUSE OF ACTION (CITE THE US CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE BRIEF STATEMENT OF CAUSE. DO NOT CITE JURISDICTIONAL STATUTES UNLESS DIVERSITY)

28 USC 1255(a); 8 CFR 245.1; 28 USC 1331, 1361 (civil action, mandamus); Administrative Procedure Act

VII. REQUESTED IN COMPLAINT: ☐ CHECK IF THIS IS A CLASS ACTION DEMAND \$ ☐ CHECK YES only if demanded in complaint:
 UNDER F.R.C.P. 23 JURY DEMAND: ☐ YES ☒ NO

VIII. RELATED CASE(S) PLEASE REFER TO CIVIL L.R. 3-12 CONCERNING REQUIREMENT TO FILE
 IF ANY "NOTICE OF RELATED CASE".

IX. DIVISIONAL ASSIGNMENT (CIVIL L.R. 3-2)

(PLACE AND "X" IN ONE BOX ONLY)

☒ SAN FRANCISCO/OAKLAND☐ SAN JOSE

DATE

SIGNATURE OF ATTORNEY OF RECORD

10/16/07

ORIGINAL
FILED
37 OCT 16 PM 3:58
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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Attorney for Plaintiffs.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA

MEJ

NATHANIEL SEAN BOWDEN,
JUNELLE HARRIS,

Plaintiffs,

v.

ROBIN L. BARRETT, FIELD OFFICE
DIRECTOR, USCIS SAN FRANCISCO
DISTRICT OFFICE; EMILIO T.
GONZALEZ, DIRECTOR, USCIS;
U.S. CITIZENSHIP AND IMMIGRATION
SERVICES; MICHAEL CHERTOFF,
SECRETARY, DEPARTMENT OF
HOMELAND SECURITY;
DEPARTMENT OF HOMELAND
SECURITY; ROBERT S. MUELLER,
DIRECTOR, FEDERAL BUREAU OF
INVESTIGATIONS; PETER D. KEISLER,
ACTING U.S. ATTORNEY GENERAL,

Defendants.

No. **C 07 5269**

COMPLAINT FOR A WRIT OF
MANDAMUS AND DECLARATORY
AND INJUNCTIVE RELIEF

DHS Alien Number: 98-250-835

**COMPLAINT FOR A WRIT OF MANDAMUS
AND DECLARATORY AND INJUNCTIVE RELIEF**

By and through their undersigned attorney, Plaintiffs, Nathaniel Sean Bowden ("Mr. Bowden") and JuNelle Harris ("Ms. Harris"), as and for their complaint, allege as follows:

PRELIMINARY STATEMENT

1. Mr. Bowden is a native of Australia and citizen of New Zealand who is married to a United States citizen, JuNelle Harris ("Ms. Harris"). More than three years ago, Ms. Harris filed a Form I-130 (Petition for Alien Relative) on behalf of her husband, with the U.S. Citizenship and Immigration Services ("USCIS," formerly the Immigration and Naturalization Service).¹ Mr. Bowden simultaneously filed an application to register permanent residence or adjust status (Form I-485) based on his marriage to Ms. Harris and her pending I-130 petition. Inexplicably, the petition and application remain pending.

JURISDICTION

2. Jurisdiction over the subject matter of this civil action is conferred on this Court by 28 U.S.C. § 1331, as a civil action arising under the Constitution, laws, or treaties of the United States; 28 U.S.C. § 1361, as a civil action in the nature of mandamus to compel an officer or employee of the United States to perform a duty owed to Plaintiffs; 5 U.S.C. § 702, as a challenge to agency action under the Administrative Procedure Act ("APA"); and 28 U.S.C. §§ 2201 and 2202, as a civil action seeking, in addition to other remedies, a declaratory judgment.

VENUE

3. Venue is properly in this district pursuant to 28 U.S.C. §§ 1391(e)(2) and (e)(3), because a substantial part of the events giving rise to this claim occurred in this district, Mr. Bowden and Ms. Harris reside in this district, and no real property is involved in this action.

INTRA-DISTRICT ASSIGNMENT

4. Because a substantial portion of the events that gave rise to this lawsuit occurred in the County of San Francisco, this case should be assigned to the Court's San Francisco division.

¹ Pursuant to the *Department of Homeland Security Reorganization Plan, Homeland Security Act of 2002*, Pub. L. No. 107-296, 116 Stat. 2135 (2002), 6 U.S.C. §§ 101-557, as of March 1, 2003, the INS was abolished and its functions were transferred to the U.S. Citizenship and Immigration Services ("USCIS") within the Department of Homeland Security ("DHS").

STANDING

5. The APA affords a right of review to a person who is “adversely affected or aggrieved by agency action.” 5 U.S.C. § 702. Defendants’ illegal action has immeasurably delayed the adjudication of Plaintiffs’ petition and application. Plaintiffs thus fall within the APA’s standing provisions. *See, Legal Assistance for Vietnamese Asylum Seekers v. Dep’t of State, Bureau of Consular Affairs*, 45 F.3d 469, 471-72 (D.C. Cir. 1995), *reh’g denied*, 74 F.3d 1308 (D.C. Cir.), *vacated on other grounds*, 117 S. Ct. 378 (1996); *see also, Abourezk v. Reagan*, 785 F.2d 1043, 1050-51 (D.C. Cir. 1986).

PLAINTIFFS

6. Mr. Bowden, a native of Australia and citizen of New Zealand, and Ms. Harris, a native and citizen of the United States, currently reside at 6009 Claremont Ave., #2, Oakland, California 94618. The couple married on May 22, 2004. On or about September 1, 2004, Ms. Harris filed a Form I-130 (Petition for Alien Relative) on behalf of Mr. Bowden, with the USCIS. Mr. Bowden simultaneously filed an application to register permanent residence or adjust status (Form I-485) based on his marriage to Ms. Harris. Although more than three years have lapsed since that time, the USCIS has failed to adjudicate the I-130 petition and the I-485 application.

DEFENDANTS

7. Defendant, Robin L. Barrett, is the Field Office Director of USCIS’s San Francisco District Office and is sued in her official capacity. She is “responsible for the administration and enforcement of the [Immigration and Nationality] Act and all other laws relating to immigration and naturalization within [her] assigned geographic area[.]” 8 C.F.R. § 100.2(d)(2)(ii).

8. Emilio T. Gonzalez is the Director of the USCIS and, as such, has been delegated the authority to direct the administration of the USCIS, and to enforce the INA and all other laws relating to the immigration and naturalization of non-citizens. Defendant Gonzalez is sued herein in his official capacity.

9. The United States Citizenship and Immigration Services is the federal agency within the Department of Homeland Security (“DHS”) that is responsible for the

1 administration and enforcement of the Immigration and Nationality Act ("INA") and all other
2 laws relating to the immigration and naturalization of non-citizens.

3 10. Michael Chertoff is the Secretary of the Department of Homeland Security, the
4 executive department which contains the USCIS, and is sued herein in his official capacity.
5 Defendant Chertoff is charged with the administration and enforcement of the Immigration and
6 Nationality Act pursuant to INA § 103(a), 8 U.S.C. § 1103(a).

7 11. The Department of Homeland Security is the federal agency encompassing the
8 USCIS, which is responsible for the administration and enforcement of the INA and all other
9 laws relating to the immigration and naturalization of non-citizens.

10 12. Robert S. Mueller is the director of the Federal Bureau of Investigation ("FBI")
11 and is sued herein in his official capacity. Defendant Mueller is charged with conducting
12 background checks, including the National Name Check Program, in response to requests
13 submitted by federal agencies, including the USCIS.

14 13. Peter D. Keisler is sued in his official capacity as the Acting U.S. Attorney
15 General. In that capacity, he is charged with supervising and directing the administration and
16 operation of the Department of Justice, including the FBI.

17 FACTS

18 14. Immigrating through a U.S. citizen is a two step process which involves (1)
19 approval of a Petition for Alien Relative (Form I-130) filed by the U.S. citizen petitioner, and (2)
20 the beneficiary's filing of an application to become a permanent resident (Form I-485). Once the
21 requisite relationship is established between the petitioner and beneficiary, the USCIS must
22 approve the visa petition. Once the visa petition is approved, the beneficiary can proceed to step
23 two and apply to immigrate, or become a lawful permanent resident.

24 15. Because visas are always available to immediate relatives of U.S. citizens –
25 spouses, parents, or children – those relatives can apply to immigrate as soon as the visa petition
26 is approved. *See* INA § 201(b), 8 U.S.C. § 1151(b). Accordingly, immediate relatives can
27 initiate both steps by simultaneously filing the I-130 visa petition along with the I-485
28 application for adjustment to lawful permanent resident status.

1 16. Before adjudicating an application for adjustment of status pursuant to INA §
2 245(a), 8 U.S.C. § 1255(a), USCIS conducts “numerous” criminal and national security
3 background checks, including (a) a fingerprint check by the FBI; (b) a *name check* by the FBI;
4 and (c) a check against the records of the Department’s Interagency Border Inspection System.
5 *See Liu v. Chertoff*, No. 06-3297, 2007 WL 1202961, at * 1-2 (C.D. Ill. April 23, 2007). Ninety-
6 nine percent of the FBI name checks are completed in six months. *See USCIS Interoffice*
7 *Memorandum from Michael Aytes, Acting Associate Director, Domestic Operation*, April 25,
8 2006, *reprinted* No. 21 *Interpreter Releases* 988 (May 22, 2006). In Mr. Bowden’s case,
9 however, the name check process has taken more than three years and has still not been
10 completed

11 17. Lawful permanent resident status confers many advantages. Lawful permanent
12 residents have the privilege of residing and working permanently in the United States, INA §
13 101(a)(20), 8 U.S.C. § 1101(a)(20), they may travel outside the United States freely and generally
14 are readmitted to the United States automatically, INA § 101(a)(13)(C), 8 U.S.C. §
15 1101(a)(13)(C), and they may petition to immigrate close family members, INA §§ 201 and 203,
16 8 U.S.C. §§ 1151 and 1153.

17 18. After five years of status as a lawful permanent resident, an individual may apply
18 to naturalize his status to that of a U.S. citizen. INA § 316(a), 8 U.S.C. § 1427(a). Because
19 lawful permanent resident status is a prerequisite for naturalization, any delay in adjusting to
20 lawful permanent resident status also delays eventual naturalization.

21 19. This lawsuit arises out of Defendants’ illegal delay in the adjudication of Ms.
22 Harris’ I-130 visa petition and Mr. Bowden’s application for status as a lawful permanent
23 resident (Form I-485).

24 20. Mr. Bowden was born on May 4, 1975 in Australia. He first entered the U.S. on
25 September 6, 1998 to complete a doctoral program at Harvard University in Cambridge,
26 Massachusetts. After completing his course of study, Mr. Bowden changed his status to that of a
27 nonimmigrant worker, authorized to work for Sandia National Laboratories until October 20,
28 2009.

1 21. Meanwhile, on May 22, 2004, Mr. Bowden married his long-time girlfriend, Ms.
2 Harris, a native and citizen of the U.S. On or about September 1, 2004, Ms. Harris filed a Form
3 I-130 (Petition for Alien Relative), on behalf of Mr. Bowden, with the USCIS. Mr. Bowden
4 simultaneously filed an application to register permanent residence or adjust status (Form I-485)
5 based on his marriage to Ms. Harris and the I-130 petition she had filed on his behalf. The
6 petition and application have been pending with the USCIS since that time.

7 22. On March 16, 2005, the USCIS issued a Fingerprint Referral Notice to Mr.
8 Bowden requesting that he provide his fingerprints in conjunction with his application for
9 adjustment of status. Mr. Bowden complied.

10 23. On April 13, 2005, Mr. Bowden and Ms. Harris attended a scheduled interview at
11 the USCIS San Jose Sub-Office. At the conclusion of that interview, the USCIS indicated that
12 the FBI name check was pending. On November 29, 2005, Mr. Bowden, through his counsel,
13 submitted a status inquiry to the USCIS San Francisco District Office, but received no response.

14 24. On September 21, 2006, the USCIS issued a notice to Mr. Bowden requesting that
15 he again provide his fingerprints. Mr. Bowden complied with that request.

16 25. On November 16, 2006, the USCIS San Francisco District Office issued a notice
17 requesting that Mr. Bowden appear for an interview at that office on December 20, 2006, in
18 regards to his application for adjustment of status. At that interview, the USCIS officer indicated
19 that he would adjudicate Ms. Harris' I-130 shortly, and explained to Plaintiffs' counsel that the
20 delay in adjudication of Mr. Bowden's application was due to (a) pending background checks
21 and (b) that the previous interviewing USCIS officer had failed to follow proper procedures,
22 specifically that he had neglected to have Mr. Bowden sign the application after reviewing it with
23 him. After indicating that the USCIS would obtain a New Zealand police clearance for Mr.
24 Bowden, the USCIS officer stated that the I-485 application would remain pending until the
25 background checks had cleared. To date, however, it appears that the FBI has failed to complete
26 those background checks.

27 26. On March 5 and again on April 30, 2007, counsel for Mr. Bowden and Ms. Harris
28 sent status inquiry letters to the USCIS about Ms. Harris' I-130 petition. A response was never

1 received.

2 27. Mr. Bowden and Ms. Harris have taken exhaustive steps in an attempt to compel
3 Defendants to adjudicate their I-130 petition and I-485 application. Although more than three
4 years have lapsed since they filed those documents and Mr. Bowden's application for adjustment
5 of status is well outside the processing times of the USCIS San Francisco District Office, the
6 USCIS has still not adjudicated his application.²

7 28. The FBI's willful delay in completing Mr. Bowden's background checks and
8 USCIS's willful delay in adjudicating Ms. Harris' I-130 petition and Mr. Bowden's I-485
9 application clearly contravenes the FBI's and USCIS's duty to act upon matters presented to
10 them within a reasonable period of time. *See* 5 U.S.C. § 555(b) ("With due regard for the
11 convenience and necessity of the parties or their representatives and within a reasonable time,
12 each agency shall proceed to conclude a matter presented to it."); *Tang v. Chertoff*, 493 F.Supp.
13 2d 148, 156 (D. Mass June 26, 2007) (finding a 4 year delay unreasonable), *citing Paunescu v.*
14 *INS*, 76 F.Supp. 2d 896, 902 (N.D.Ill. 1999) (2 year delay unreasonable); *Yu v. Brown*, 36
15 F.Supp. 2d 922, 935 (D.N.M. 1999) (2.5 year delay unreasonable); *Agbemaple v. INS*, 1998 WL
16 292441 *7 (N.D.Ill. 1998) (20 month delay unreasonable); *Hu v. Reno*, 2000 U.S. Dist. Lexis
17 5030, at *14 (N.D.Tex. Apr. 19, 2000) (2.5 year delay unreasonable); *Salehian v. Novak*, 2006
18 U.S. Dist. LEXIS 77028 at *4 (D.Conn.Oct. 23, 2006) (2 year delay unreasonable).

19 29. Accordingly, this civil action seeks a writ of mandamus ordering the FBI to
20 promptly complete Mr. Bowden's background checks and USCIS to promptly adjudicate Ms.
21 Harris' I-130 petition and Mr. Bowden's I-485 application.

22 30. Plaintiffs have exhausted any administrative remedies that may exist. No other
23 remedy exists for Plaintiffs to resolve Defendants' refusal to comply with their regulatory
24 obligations within a reasonable period of time.

25 ² *See* <https://egov.uscis.gov/cris/jsps/officeProcesstimes.jsp?selectedOffice=69> (six months
26 processing time for applications for adjustment of status filed at the USCIS San Francisco District
27 Office).

31. Plaintiffs have suffered, and will continue to suffer, irreparable injury for which they have no adequate remedy at law. If the relief prayed for is not granted, Plaintiffs will suffer continued extreme individual hardship.

FIRST CAUSE OF ACTION
(Mandamus)

32. Plaintiffs repeat, allege, and incorporate paragraphs 1 through 30 above as though fully set forth herein.

33. Mr. Bowden's application for adjustment of status is delayed due to Defendant Mueller's failure to timely perform criminal background checks and/or the other Defendants' failure to act on that application. Defendants have the nondiscretionary duty to adjudicate the I-130 petition and I-485 application filed by Plaintiffs. By failing to do so, Defendants are, quite simply, failing to comply with their statutory and regulatory duties. Plaintiffs are entitled, therefore, to relief in the nature of mandamus pursuant to 28 U.S.C. § 1361 to compel Defendant Mueller to complete all necessary background checks and provide the results of those background checks to the remaining Defendants to promptly adjudicate their I-130 petition and I-485 application.

SECOND CAUSE OF ACTION
(Violation of the Administrative Procedure Act)

34. Plaintiffs repeat, allege, and incorporate paragraphs 1 through 32 above as though fully set forth herein.

35. The APA *requires* administrative agencies to act upon matters presented to them "within a reasonable time," 5 U.S.C. § 555(b), and provides that federal courts "**shall . . .** compel agency action unlawfully withheld or unreasonably delayed . . ."³ 5 U.S.C. § 706(1) (emphasis

³ "Courts have given little attention to the distinction between agency action 'unlawfully withheld' and agency action 'reasonably delayed.'" *Forest Guardians v. Babbitt*, 164 F.3d 1261, 1270 (10th Cir. 1998). "In the absence of any clear statutory guidance," however, the Tenth Circuit decided to "simply apply the most straight forward common sense reading of these two phrases," saying:

[I]f an agency has no concrete deadline establishing a date by which it must act, and instead is

added). By using the word “shall,” Congress imposed a mandatory duty on this Court to compel agency action that has been “unreasonably delayed.” *Forest Guardians v. Babbitt*, 164 F.3d 1261, 1269 (10th Cir. 1998)(“Through § 706 Congress has stated unequivocally that courts *must* compel agency action unlawfully withheld or unreasonably delayed.”)(emphasis added). *See also* *Pierce v. Underwood*, 487 U.S. 552, 569-570 (1988)(Congress’ use of “shall” constitutes mandatory language); *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 739 n.15 (1981)(same).

36. Plaintiffs are persons aggrieved by agency action under the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.* By failing to complete and provide the results of the criminal background checks to USCIS, Defendant Mueller has “unlawfully withheld or unreasonably delayed” agency action in violation of 5 U.S.C. § 706(1). In the alternative, if the background checks have been completed, the remaining Defendants have unlawfully delayed final adjudication of Mr. Bowden’s application for adjustment of status.

37. Accordingly, this Court should compel Defendant Mueller to complete and release the results of Mr. Bowden’s criminal background checks to the remaining Defendants, so that his application for adjustment of status may be immediately adjudicated. On the other hand, if Defendant Mueller has completed the background checks, the Court should compel the other Defendants to immediately adjudicate Ms. Harris’ petition and Mr. Bowden’s application. By failing to adjudicate the I-130 petition and I-485 application filed by Plaintiffs, Defendants have acted arbitrarily and capriciously and have “unlawfully withheld or unreasonably delayed” agency action in violation of 5 U.S.C. § 706.

governed only by general timing provisions – such as the APA’s general admonition that agencies conclude matters presented to them “within a reasonable time,” *see* 5 U.S.C. § 555(b) – a court must compel only action that is delayed unreasonably. Conversely, when an entity governed by the APA fails to comply with a statutorily imposed absolute deadline, it has unlawfully withheld agency action and courts, upon proper application, must compel the agency to act.

Id. at 1271-72.

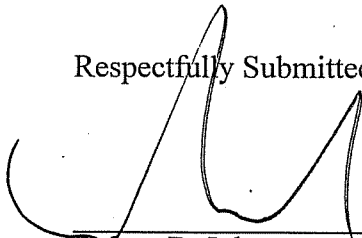
PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that this Court:

- (1) Accept jurisdiction over this action;
- (2) Compel the completion and immediate release of Mr. Bowden's criminal background check results;
- (3) Declare Defendants' failure to adjudicate the I-130 petition and I-485 application filed by Plaintiffs to be a violation of 28 U.S.C. § 1255(a), 8 C.F.R. § 245.1, the Administrative Procedure Act, and 28 U.S.C. § 1361;
- (4) Order the USCIS to immediately adjudicate Plaintiffs' I-130 petition and I-485 application;
- (5) Grant attorney's fees and costs of court under 28 U.S.C. § 2412, 28 U.S.C. § 1920, Fed. R. Civ. P. 54(d), and other authority; and
- (6) Grant such other and further relief as this Court deems just and proper under the circumstances.

DATED: October 16, 2007

Respectfully Submitted,



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